Supreme Court, U. S.
FILED
JAN 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HERBERT J. MILLER, JR.
WILLIAM H. JEFFRESS, JR.
R. STAN MORTENSON
JAMES E. ROCAP, III

MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037

Attorneys for the Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1
OPINIONS BELOW 2
JURISDICTION 2
QUESTIONS PRESENTED 2
STATEMENT
A. The Tape Recordings At Issue 3
B. Proceedings In The District Court 5
C. The Decision of The Court of Appeals 9
REASONS FOR GRANTING THE WRIT 12
CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Application of Bendix Aviation Corp., 58 F. Supp. 953 (S.D.N.Y. 1945) 17
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 18
Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956). 18
Nixon v. Administrator of General Services, No. 75-1605 . . . . . 11, 16
Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) 4
Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1975). 17
Sheppard v. Maxwell, 384 U.S. 333 (1966) 19, 20
United States v. Mitchell, et al., Cr. No. 74-110 (D.D.C.) 3
United States v. Monjar, 154 F.2d 954 (3d Cir. 1946). 16
United States v. Nixon, 418 U.S. 682 (1974) 3, 4, 7, 13, 15, 16

Page

Statutes:

28 U.S.C. §1254(1) 2

Presidential Recordings and Materials Preservation Act, Pub. L. 93-526 . . . . . 11, 14, 16

Rules:

Rule 10(a), Federal Rules of Appellate Procedure 17

Rules 29(b), (h), Rules of the United States District Court for The Central District of California 18

Rule 2-10(b), Rules of the United States District Court for the District of Columbia 17

Texts:

Manual for the Clerks of the United States District Courts 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRELIMINARY STATEMENT

This petition for a writ of certiorari seeks review of the decision of the court of appeals directing the district court to furnish to the respondents copies of tape recordings of presidential conversations admitted as evidence in the trial of *United States v. Mitchell, et al.* The petitioner, Richard Nixon, was a respondent in the court of appeals. The respondents in this Court (appellants in the court of appeals) are Warner Communications, Inc.; National Broadcasting Company, Inc.; American Broadcasting Companies, Inc.; CBS, Inc.; Radio

Television News Directors Association; and Public Broadcasting Service. Other parties in the court below were parties to the criminal case out of which this proceeding arose: the United States of America, John N. Mitchell, Harry R. Haldeman, John D. Ehrlichman, Robert C. Mardian, and Kenneth W. Parkinson. The United States and Harry R. Haldeman submitted memoranda in the court of appeals, but none of these parties participated in oral argument.

OPINIONS BELOW

The opinion and judgment of the court of appeals (App. A, *infra*, pp. 1a to 27a) is not yet reported. The Memorandum Opinion and Order of the district court from which appeal was taken (App. C, *infra*, pp. 29a-35a) is reported at 397 F. Supp. 186. Two earlier memorandum opinions on the same application by a different district judge (App. D, *infra*, pp. 36a-45a) are reported at 386 F. Supp. 639.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The opinion and judgment of the court of appeals (App. A, *infra*, p. 1a) was entered on October 26, 1976, and a timely petition for rehearing was denied by order dated December 3, 1976 (App. B, *infra*, p. 28a). This petition is timely filed within 90 days of that date.

QUESTIONS PRESENTED

1. Whether tape recordings of conversations among a President of the United States and his closest aides, produced over a claim of presidential privilege in order to meet "the fundamental demands of due process of law in the fair administration of criminal justice" and thereafter

played in open court as evidence in a criminal trial, must be supplied by the court to private parties for radio and television broadcast and for sale in the form of phonograph records and tape cassettes.

2. Whether tape recordings and other physical evidence obtained by compulsory process and used as evidence in a federal court trial must be reproduced by the court and distributed to private parties upon request unless the owner can demonstrate that "justice requires" denying the request.

3. Whether the court of appeals, on the basis of a supposed common-law right of the public to obtain copies of recordings used as evidence in a criminal trial, properly overrode the determination by the district court to delay any release of the recordings until the appeals in the criminal case and any necessary retrials of the defendants were concluded.

STATEMENT

A. The Tape Recordings at Issue.

In July and August of 1974, numerous tape recordings of confidential discussions between then-President Nixon and his aides were produced by Mr. Nixon for *in camera* inspection pursuant to a subpoena by the prosecution in the Watergate conspiracy case, *United States v. Mitchell, et al.*, Cr. No. 74-110 (D.D.C.). Each of these tape recordings had been the subject of a formal claim of presidential privilege asserted by Mr. Nixon. In litigation culminating with this Court's decision in *United States v. Nixon*, 418 U.S. 682 (1974), the recordings were deemed "presumptively privileged," but the privilege was held to be overridden under the circumstances by the "demonstrated, specific need for evidence in a pending criminal

trial" combined with "the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713. The Court directed the trial judge to inspect the recordings *in camera* and to transmit to the Special Prosecutor those portions deemed relevant and admissible in evidence.[1]

During the course of the Watergate conspiracy trial, selected portions of the subpoenaed tapes, totaling some twenty-two hours of conversations, were admitted into evidence and played for the benefit of the jury. When the tapes were played in the courtroom, members of the press and the public in attendance, as well as members of the jury, were equipped with headphones enabling them to hear the evidence as accurately and conveniently as possible, and printed transcripts of each conversation were distributed to those present as well as to the press and the general public. No limitations of any kind were placed on the press or the general public as to reporting or what occurred in the courtroom or as to the uses that might be made of the transcripts.

The conversations played during the trial are contained on some fifty separate tape reels, which were reproduced from the original tapes. (JA 21-22.)[2] Only portions of these reels were played to the jury; the portions of conversations not played remain confidential. To produce a tape recording containing only those portions of the conversations used as evidence in the trial would require five to seven days work by a sound recording technician and the participation of someone sufficiently familiar

[1]Other recordings had been produced under similar circumstances in November 1973 following the decision in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

[2]The abbreviation "JA" refers to the Joint Appendix filed in the court of appeals.

with the tapes to locate and identify the published portions. (JA 22-23.)

B. Proceedings In The District Court.

Prior to the commencement of the trial, news commentators for the commercial television networks requested Judge Sirica to make available to them, for copying, the tapes played during the course of the trial. In a letter dated October 2, 1974 (App. E, *infra*, pp. 46a-48a), Judge Sirica denied the request, citing an attached memorandum of the Chief Judge of the District Court, representing a consensus of the district court judges consulted on the matter. This memorandum noted the uniform opposition of the Court to broadcasting of court proceedings, and stated: "As we understand it, actual verbatim transcripts will be exhibited and marked and available to the Press and that would appear to constitute more than adequate disclosure to the public of what the tapes contained" (p. 48a, *infra*).

On November 12, the respondent broadcast companies filed an application before Judge Sirica claiming a right under the First and Sixth Amendments to obtain copies of the tapes played in evidence during the trial then in progress. The stated purpose of the application was to permit broadcast of the recorded conversations on television and radio. On December 2, Warner Communications Inc. filed a separate application for copies of the portions of the tapes played in evidence in order to make and sell phonograph records and tape cassettes of the conversations (JA 41). Petitioner Richard Nixon filed an opposition to the applications, which were assigned to Judge Gesell for determination while the Watergate criminal trial was in progress before Judge Sirica.

On December 5, 1974, Judge Gesell entered a Memorandum and Order on the various applications.

Judge Gesell found the applicants' First Amendment claim "wholly without merit" (p. 37a, *infra*) and held that Mr. Nixon had standing to oppose the applications (p. 41a, *infra*). He rejected the petitioner's opposition, however, on the ground that Mr. Nixon's words on the tapes had become "public property" (*id.*), and indicated that the applicants were entitled to copies of the portions of the tapes in issue if "a satisfactory mechanism and procedure can be evolved" (p. 43a, *infra*).

On December 27, the respondents jointly submitted a "memorandum on implementation of the Court's order" and a 3-page proposed order (JA 73-75) setting forth technical and logistical procedures for duplicating the recorded conversations in a manner suited to the respondents' purposes. On January 8, 1975, Judge Gesell entered an order rejecting the proposal. Judge Gesell concluded (p. 44a, *infra*):

> "The burden is upon the applicants to come forward with a satisfactory plan to be administered without profit by some responsible agency or person other than the Clerk of Court. It is a prerequisite to any plan that commercialization of the tapes or any undignified use of the material be minimized. Applicants have failed even to consider these matters. Moreover they suggest no responsible agency or person to administer the plan and merely undertake to place all of these problems back on the Court, which is not equipped with necessary funds, technology or manpower."

The order denied all applications without prejudice, and, since the Watergate trial had by then been completed, transferred the matter back to Judge Sirica for "any further action that may be appropriate in the premises at some later date." (*Id.*) No appeal was taken from this order.

On March 6, 1975, Judge Sirica held a status conference at which he solicited the views of counsel on whether, in view of the pending appeals from convictions in the Watergate conspiracy trial, further action on the applications should be postponed. Following a brief argument, the Court invited the parties to submit written memoranda on this point, and such memoranda were submitted by the respondents and by petitioner Richard Nixon on March 13, 1975.

Judge Sirica entered a Memorandum Opinion and Order on April 4, 1975. (App. C, *infra*, pp. 29a-35a.) The opinion noted at the outset: "This matter comes before the Court solely for consideration of the narrow issue of the timing of the release, if ever, of certain tapes received in evidence in the case of *United States v. Mitchell, et al.*, CR 74-110" (p. 29 a, *infra*). On this preliminary issue, the Court concluded that any release and distribution of the requested tapes should await decision of the appeals by the convicted defendants in the Watergate conspiracy trial.

The reasons for Judge Sirica's determination were thoroughly explained in his opinion. First, the court noted that all four convicted defendants had filed notices of appeal, and should one or more of them prevail, a new jury would have to be empaneled and the case retried. In view of that circumstance, "the Court still must be careful to protect the rights of the defendants as well as the integrity of the evidence" (p. 30a, *infra*). Judge Sirica also took note of the admonition of the Supreme Court in *United States v. Nixon, supra,* that the District Judge should "at all times accord to presidential records that high degree of deference suggested in *United States v. Burr* . . .," and continued (p. 31a, *infra*): "It is in the light of this solemn responsibility as well as a concern for

the rights of the defendants that the applicants' request for immediate access to the tapes must be examined."

The district court then noted the likelihood of distribution of tapes and phonograph records of the conversations "perhaps with commentary by journalists or entertainers," marketed by "mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales," and which "would be put to untold varieties of inappropriate and scandalous uses, just as any other commercial recording would be." The court concluded (p. 31a, *infra*):

> "Thus, it appears to the Court that the rights of the appellants in the criminal case (and many others), might be seriously and permanently damaged as a result of granting the applicants' request for immediate release of the tapes."

The interests advanced by the applicants in favor of immediate release, the district court held, were not compelling. No restraints were presently or had been placed on disseminating transcripts or reporting what occurred during the trial, and "the argument that the public's 'right to know' presents a compelling reason for granting immediate access to the tapes must be rejected." (p. 32a, *infra.*) The court found that "no harm will be done if the possible release of the tapes and any further implementation of the December 5, 1974 Order is delayed until the appeals in the *Mitchell* case are decided." (p. 34a, *infra.*) For these reasons, the district court denied "without prejudice" the respondents' "petitions for immediate access" to the tapes for the purpose of copying. (*Id.*) The respondents appealed.

C. The Decision of the Court of Appeals.

The court of appeals did not address what it termed "the novel constitutional question of whether a ban on inspecting or copying the tapes would offend the First, Sixth or Fifth Amendments to the Constitution." It held that there exists a "common-law right to inspect and copy judicial records," which "extends to exhibits" regardless of their nature. (P. 14a, *infra.*) The court stated that exceptions might be made to this "common-law right," but that such exceptions may be made only where "justice so requires." (P. 15a, *infra.*) On that basis, the court held that the question in this case, which the district court "should have addressed," was as follows (p. 17a, *infra*):

> "[W]hether appellee, who sought to interfere with a fundamental common law right, had sustained his burden of demonstrating that justice required denying access to the court records."

The court then concluded *(id.)*: "Once the question is recast in these terms, the answer becomes inescapable . . ."

The court first addressed the finding by Judge Sirica that putting the tapes in the hands of broadcasters and record companies might "seriously and permanently damage" the rights of the criminal defendants in the event a retrial became necessary.[3] The court of appeals

---

[3]The court correctly noted (p. 20a n. 47, *infra*) that it was not the petitioner, but the trial judge, who raised this concern *sua sponte*. The court failed to explain why the petitioner bore a "burden" of "demonstrating that justice required" this action by Judge Sirica, when the petitioner has no direct interest in the criminal case and the trial judge was the one person with the greatest familiarity with the evidence, the problems of selecting an unbiased jury, and the likelihood of retrials of some of the defendants.

held the trial judge's concern to be insufficiently serious to warrant withholding distribution of the tapes until the criminal appeals were concluded, because (1) retrials were at the time only a "possibility,"[4] (2) the court "seriously question[ed]" whether "listening to the tapes prior to a retrial would render every listener incapable" of rendering a fair verdict as a juror (p. 19a, *infra*), and (3) neither the government nor the criminal defendants had objected, in the district court, to the respondents' applications. On the last point, the court noted that defendant Haldeman had filed a memorandum in the court of appeals opposing distribution of the tapes on the ground that the resulting publicity would jeopardize his rights upon any retrial, but the court found that Mr. Haldeman's statement "hardly warrants careful attention." (P. 20a n. 47, *infra.*)

The court then turned to the question whether "concern for the privacy of the persons whose conversations were taped" or "deference owed to presidential records" could justify the district court's decision. (Pp. 20a-21a, *infra.*)[5] The court held that respect for the

---

[4]The court, in a footnote (p. 17a n. 41, *infra*), noted that it had only recently reversed the conviction of Mr. Mardian, thus presumably making a retrial more than a "possibility," but did not believe that fact should alter its conclusion.

[5]Judge Gesell discussed these factors in his earlier opinion in this matter (App. D., *infra*), but the issues were not reached by Judge Sirica. The court of appeals "presumed" that Judge Sirica did not reach them because of Judge Gesell's earlier ruling that the factors did not justify denying the relief requested by the respondents. Yet Judge Sirica's opinion (App. C., *infra*), belies that "presumption." Judge Sirica spoke of the release, "*if ever,*" of the recordings (p. 29a, *infra*), and merely determined to postpone consideration of the "*possible*" release of the tapes "until the appeals in the *Mitchell* case are decided" (p. 34 a, *infra*; emphasis added). Judge Sirica thus had no reason to decide what he plainly

[footnote continued]

interests of the petitioner and others in being free from mass merchandising and sale of their words spoken in confidence was not a justifiable basis for declining to distribute copies of the recordings, stating that "neither courts nor legislatures have felt this interest worthy of protection," and observing that the tapes do not contain "bedroom or other intimate conversations," but rather discussions "between business associates." (P. 22a, *infra.*) As to the admonition of this Court, referred to by Judge Sirica, that the district court must "accord to presidential records that high degree of deference suggested in *United States v. Burr* . . .", the court of appeals held that such deference was required only in safeguarding their confidentiality, not in their treatment after being once disclosed. The contention that mass distribution and marketing of the tapes would offend the respect owed by the court to the office of the President was, the court believed, merely "a question of taste" offering "a singularly weak basis" for the court to reject the applications. (P. 25a, *infra.*) Furthermore, the court added, these considerations have less weight because "it seems likely that as a result of the Presidential Recordings and Materials Preservation Act, the words and sounds at issue here will find a further entry way into the public domain." (P. 23a, *infra.*)[6]

---

regarded as serious issues in this regard. In view of the fact that Judge Gesell ruled that "if any release is to be made, it must obviously be accomplished on a basis which does not permit overcommercialization of the evidence" (p. 42 a, *infra*), and in view of the indications from the court of appeals (p. 21a n. 52, *infra*) and the respondents that no such basis will be possible, it can hardly be said that Judge Gesell's decision represented the "law of the case."

[6]The constitutionality of this Act, and thus the validity of the court of appeals' reasoning in this regard, is presently before this Court in *Nixon v. Administrator of General Services*, No. 75-1605 (prob. juris. noted November 29, 1976).

The court thus reversed Judge Sirica's order and remanded for development of a "plan for release" of the recordings embodying the principles outlined earlier by Judge Gesell. On motion of the petitioner, the court stayed its mandate pending a petition for certiorari, but remanded the record to commence proceedings looking to the development of a plan for distribution.[7]

Judge MacKinnon, dissenting, noted that "[a]ccess to exhibits in a criminal trial is somewhat different from access to the transcript of oral testimony" (p. 26a, *infra*), for "exhibits, such as the tapes, are the personal property of the owner, and the usual practice is to return them when the case is finished." (*Id.*) He noted that the process of reproduction and distribution of the tapes could "compromise the integrity of a vital trial exhibit (p. 27a n. 4, *infra*), thus possibly constituting "good cause in a subsequent trial for a court to reject them as unreliable evidence." (P. 26a, *infra.*) Judge MacKinnon would have affirmed the district court's determination to withhold any action until all appellate remedies and necessary retrials were concluded, for "[a] significant *reduction* in the possibility of prejudice to a fair trial should not cause a court concerned with constitutional rights to ignore the possibility of prejudice that remains." (P. 27a, *infra.*)

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals establishes three propositions of novel and continuing significance to the scope of the historic decision of this Court in *United*

[7]On December 22, 1976, Judge Sirica issued a Memorandum and Order setting forth a tentative "procedure for developing the plan" for copying and distribution of the tapes.

States v. Nixon, 418 U.S. 683 (1974), as well as to the administration of justice in the federal courts. They are:

- That the necessary consequence of any judicial determination to override an assertion of presidential privilege in order to fulfill "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions," 418 U.S. at 707, is to place the subpoenaed materials in the hands of private parties to be broadcast on television, to be marketed in the form of phonograph records and cassettes, to be played at cocktail parties and in satiric productions, and to be exploited in any other fashion that may occur to enterprising and imaginative recipients.
- That physical evidence obtained by compulsory process from third parties for use as evidence in a federal court must, if technically feasible, be reproduced by the court and provided to private parties upon request absent a demonstration by the owner that "justice requires" denying the request.
- That a district judge may not decline to provide copies of physical evidence in a criminal trial to the news media and the public at the conclusion of the trial, despite its finding that such distribution might seriously prejudice the rights of the defendants to a fair trial should the conviction be reversed on appeal.

These propositions are separately discussed below. Preliminarily, it should be clear that, despite misleading statements in the opinion of the court of appeals, this case does *not* involve any attempt by the district court to impose secrecy of any kind upon its records or proceedings, or to limit the press or the public in any way as to what may be printed or broadcast. The court of appeals repeatedly spoke of "the common law right to inspect public records" (p. 9a, *infra*), the "right of access

to judicial records" (p. 10a, *infra*), and implied that Judge Sirica's decision was "an attempt to maintain secrecy" (p. 9a, *infra*), "denying public access to real and documentary evidence" (p. 13a, *infra*), and an exercise of "the power to seal [court] records . . ." (p. 14a, *infra*).

The suggestion that these conversations have been maintained in "secrecy" or "under seal" is absurd. They were played in open court, where the press and the public in attendance were provided earphones for convenient listening; transcripts were provided to all who requested them, and continue to be available at bookstores around the country. Furthermore, the district court has not denied *access* to the tape recordings by the respondents, at this or any other time; indeed, no request has been made, so far as the record shows, simply to inspect the recordings. The application in the district court was to *obtain copies* of the recordings in order to enable the respondents to broadcast and sell them.

The distinction between access and public distribution has been clearly recognized in other contexts. For example, tape recordings of oral arguments in this Court deposited with the National Archives may be played to members of the public "for serious scholarly and legal research," but copies may not be provided except after the expiration of three years from the date of oral argument and then only with permission of the Marshal; and "copies of the tapes will not be reproduced for commercial purposes." (GSA Accession Inventory, April 9, 1974, reprinted as Appendix F, *infra.*) Furthermore, the matter of providing copies of presidential conversations under the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526, has been a source of continuing disagreement between the General Services Administration and the Senate. (See p. 23a, n. 57, *infra.*)

This is not, therefore, a case which falls within the tradition of the cases cited and relied upon by the court of appeals. The action of the court of appeals represents a departure from tradition, and a precedent which puts in serious doubt the power of a district court to control the uses to which its own process is put and to protect the rights of parties and witnesses in the criminal justice system.

1. In *United States v. Nixon,* 418 U.S. 683 (1974), this Court recognized a presumptive privilege for confidential presidential communications, which rests on "the values to which we accord deference for the privacy of all citizens," as well as "protection of the public interest in candid, objective and even blunt or harsh opinions in presidential decisionmaking." *Id.* at 708. The Court ruled, however, that "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions" required that the recordings be produced, because of the "demonstrated, specific need for [this] evidence in a pending criminal trial." *Id.* at 707, 713. In requiring production of the tapes, the Court specifically directed the district judge to "at all times accord to presidential records that high degree of deference suggested in *United States v. Burr.* . . ." *Id.* at 715.

The "specific need for evidence in a pending criminal trial," which was the sole reason and purpose for the compelled production of these tape recordings, has now been satisfied. The question raised by the present case is whether a necessary product of this Court's ruling in *United States v. Nixon, supra*—and a necessary concomitant of any future ruling enforcing a subpoena for presidential tape recordings—is to put copies of the recordings in the hands of broadcast companies, phonograph record manufacturers, comedy teams, foreign

governments and organizations, or anyone else who desires them. Even if a district court has discretion to reproduce and distribute recordings in its possession pursuant to subpoena, a proposition with which we disagree, a decent respect for the delicate relationship between the Judicial and Executive Branches in matters concerning compelled disclosure of presidential communications—emphasized by this Court in *United States v. Nixon, supra*—would appear to dictate that the recordings not be publicly disseminated in this case. We submit that the decision of the court of appeals that such considerations are no more than "a question of taste" inappropriate for judicial cognizance, warrants review by this Court.[8]

2. Tape recordings and other physical exhibits (films, videotapes) are used as evidence in federal courts with increasing frequency, and are often obtained under legal compulsion without the consent of the person whose voice or image appears in the exhibit. Tapes of wiretapped conversations are but one common example. The clerk of a district court, with respect to this property, has been held to function "as a mere custodian," having possession as "an incident of the trial before the District." *United States v. Monjar*, 154 F.2d 954, 957 (3d Cir. 1946). Subpoenaed records remain the

[8]The court of appeals apparently felt the consequences of public distribution of the recordings by the court were to be given less weight in this case because "it seems likely that as a result of the Presidential Recordings and Materials Preservation Act, the words and sounds at issue here will find a further entry way into the public domain." (P. 23a, *infra*.) The constitutionality of that Act on its face, however, is now pending before this Court in No. 75-1605, *Nixon v. Administrator of General Services* (prob. juris. noted Nov. 29, 1976), and even under the Act, it is far from certain at this time that copies of presidential tape recordings will be disseminated to the public.

property of the owner, and must be returned once the judicial proceeding which required their production is concluded. See *Robert Hawthorne Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1129-1133 (E.D. Pa. 1975); *Application of Bendix Aviation Corp.*, 58 F. Supp. 953, 954 (S.D.N.Y. 1945); Rules of the United States District Court for the District of Columbia, Rule 2-10(b).[9] Never before has any court, so far as our research discloses, held such property, while in the possession of the court, subject to duplication and public dissemination by the clerk without the consent of the party from which it is obtained.[10]

The court below referred to tapes of wiretapped conversations and pornographic film exhibits as "special cases" which might justify a different rule (pp. 13-14a, *infra*), though how such cases are to be distinguished from the present case is not apparent. Indeed, given the burden that the court of appeals held to be required of anyone who would "interfere" with public distribution of trial exhibits—*i.e.*, to demonstrate that "justice requires" withholding distribution—a court reporter's tape recording of a criminal trial, surely a "judicial

[9]The court of appeals conceded that exhibits "generally are returned to their owners," but stated this to be "primarily because it is impractical to retain the exhibits in the courthouse." (P. 13a, *infra*.) Insofar as the court implied that a person may, if "practical," be permanently deprived of his property—in essence, suffer condemnation—merely by the issuance of a trial subpoena, its holding is even more radical than may at first appear.

[10]The facts that Rule 10(a), Federal Rules of Appellate Procedure, provides that exhibits shall be included in the record on appeal, and that the "Manual for the Clerks of the United States District Courts" provides for "retention" for "documentary exhibits" in historic cases (see p. 12a, *infra*), are irrelevant; neither the Rule nor the Manual provide for reproduction and public distribution of any exhibits whatsoever.

record," would seem to be henceforth subject to copying and broadcast upon demand of the networks or other private parties. Thus, the decision of the court of appeals casts in serious doubt the legality of local court rules which prohibit use of any such recording, or any recording or videotape of a deposition used as evidence in a trial, on radio or television broadcasts. See Rules of the United States District Court for the Central District of California, Rules 29(b), 29(h).

We submit that where, as here, all the requirements of a "public trial" under the Sixth Amendment are abundantly satisfied, and where there can be no claim of secrecy as to the records or proceedings of the court, there is no justification in law or tradition for subjecting one whose recorded words are subpoenaed for the sole purpose of use as evidence in a criminal trial, to the additional indignity of having those words disseminated by the court for broadcast and sale.[11] At least, if the

[11]Contrary to the assertion by the Court of Appeals (p. 22a, *infra*), the petitioner did *not* "concede" that intrusion on the sensibilities of persons whose recorded conversations are appropriated for broadcast and sale "is not the type of injury against which the law provides protection." The petitioner *did* concede that, if the court released the tapes to the respondents for broadcast, it is doubtful whether petitioner would have a cause of action under the privacy laws against the broadcasters. This is because once a court places a physical exhibit in the public domain (*i.e.*, beyond the exhibit's necessary use in the course of a judicial proceeding), a privacy action based on its reproduction and distribution would presumbaly be subject to the rule of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), limiting privacy actions in such circumstances. The *injury* resulting from release—"offense to [an individual's] sensibilities caused by some unwanted and unwarranted publication of his likeness or activity," *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 496 (3d Cir.) (Hastie, J., dissenting), *cert. denied*, 351 U.S. 926 (1956)—is very much one which courts have felt worthy of protection, and which the district court was entitled, if not compelled, to take into account in determining whether to release the tapes at all.

court of appeals' holding is to be the rule followed henceforth by federal courts, it is this Court that should so decide.

3. This Court has fixed in explicit terms the duty of a trial judge to take "strong measures" to guard against the influence of unwarranted publicity upon the criminal trial process. The Court stated, in *Sheppard v. Maxwell*, 384 U.S. 333, 362-363 (1966):

> "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."

By contrast, the decision of the court of appeals in the present case totally ignores the primary role of the trial judge in deciding what steps are necessary or appropriate, in the context of a particular case, to protect its process against prejudicial publicity. Furthermore, the court below explicitly barred a judge from examining whether there is any "compelling reason" to take action which will necessarily create publicity unfavorable to an accused; it rather has imposed a duty on a party opposing such action to demonstrate that "justice requires" denying the relief requested by the media.

Obviously, where protective measures come into conflict with First or Sixth Amendment rights of an accused or of the public, an appellate court must ensure that the balance is properly struck. In this case, however, no constitutional right of the respondents or the public is

at stake; even the court of appeals characterized the right of the respondents as a "common law right to inspect and copy judicial records," which the court extended to include trial exhibits. (P. 14a, *infra.*) In substance, the court of appeals, by divided vote, has merely substituted its judgment as to whether the integrity of the trial process requires withholding distribution of the tapes for the judgment of the trial judge, the one person most qualified to make such a determination. If a trial court is not permitted the discretion to make its own considered determination as to whether a particular action is consistent with its duty to protect the integrity of its processes from prejudicial publicity, then we suggest that this Court's principle stated in *Sheppard v. Maxwell, supra,* must henceforth be treated as a hollow admonition.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT J. MILLER, JR.
WILLIAM H. JEFFRESS, JR.
R. STAN MORTENSON
JAMES E. ROCAP, III

MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037

Attorneys for the Petitioner.

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1409

UNITED STATES OF AMERICA

v.

JOHN MITCHELL, ET AL.

IN RE: NATIONAL BROADCASTING COMPANY, INC., ET AL., APPELLANTS

No. 75-1410

UNITED STATES OF AMERICA

v.

JOHN MITCHELL, ET AL.

WARNER COMMUNICATIONS, INC., APPELLANT

Appeals from the United States District Court for the District of Columbia

(D.C. Miscellaneous 74-128)

Argued February 20, 1976

Decided October 26, 1976

[illegible] entered this date

Floyd Abrams for appellants in No. 75-1409.

Joseph A. Califano, Jr., with whom *Richard M. Cooper* and *Sidney Rosdeitcher*, were on the brief for appellant in No. 75-1410.

William H. Jeffress, Jr., with whom *Herbert J. Miller, Jr.*, was on the brief for appellee, Richard Nixon. *R. Stan Morenson*, also entered an appearance for appellee Richard Nixon.

Henry S. Ruth, Jr., Special Prosecutor, entered an appearance for appellee United States.

Frank H. Strickler, entered an appearance for appellee Haldeman.

Before: BAZELON, *Chief Judge*, MACKINNON, *Circuit Judge* and MERHIGE,* *United States District Judge* for the Eastern District of Virginia

Opinion for the Court filed by *Chief Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

BAZELON, C.J.: In this action the three commercial television networks joined by the Public Broadcasting System, the Radio Television News Directors Association, and a large manufacturer of phonograph records, seek to inspect and copy those portions of former President Nixon's "White House tapes" that were played before the jury at the criminal trial of several of Nixon's top aides. It is conceded that one who listens to the tapes—the inflections, pauses, emphasis and the like—will be better able to understand the conversations than one who only reads the written transcripts that already have been published. The district court nonetheless held that at least until the former aides' pending appeals from

* Sitting by designation pursuant to 28 U.S.C. § 292(d).

their convictions are decided, the tapes cannot be distributed. We reverse.

I

On June 17, 1972, five men employed directly or indirectly by the Committee to Reelect the President were arrested inside the Democratic National Committee's offices in the Watergate office building. They were there to photograph documents and to repair a hidden listening device installed during a previous burglary. On September 15, 1972, these men and two others were indicted for conspiracy, burglary, and an unlawful endeavor to intercept wire communications. They were all convicted.[1]

On March 1, 1974, seven additional individuals, including former Attorney General Mitchell and three former top White House aides were indicted for, *inter alia*, conspiring to obstruct justice by concealing the identities of the persons responsible for the Watergate break-in. Trial began in that case on October 1, 1974 and concluded three months later with four convictions and one acquittal.[2]

[1] Bernard Barker, Eugenio Martinez, Frank Sturgis, Virgilio Gonzalez and Howard Hunt entered pleas of guilty in United States v. Liddy, D.D.C. Crim. No. 1827-72; the attempt of the first four defendants to withdraw their guilty pleas was unsuccessful, United States v. Barker, 514 F.2d 208 (D.C.Cir.), *cert. denied*, 421 U.S. 1013 (1975). James McCord and Gordon Liddy were found guilty after trial and their convictions were affirmed by this court. United States v. Liddy, 509 F.2d 428 (1974), *cert. denied*, 420 U.S. 911, (1975); United States v. McCord, 509 F.2d 334 (1974), *cert. denied*, 421 U.S. 930 (1975).

[2] The four convicted defendants appealed to this court. Three of those convictions were affirmed, United States v. Haldeman et al., No. 75-1381 (D.C.Cir. Oct. 12, 1976), and one was reversed, United States v. Mardian, No. 75-1383 (D.C.Cir. Oct. 12, 1976). One defendant pleaded guilty prior to trial; another's case was severed and ultimately dismissed.

Prior to trial, the Watergate Special Prosecutor subpoenaed certain tape recordings of conversations between then-President Nixon and his former aides. The President contested the validity of the subpoena, but the Supreme Court eventually upheld it.[3] The tapes were then turned over to the district court which, after listening to them *in camera*, arranged to have a copy made of the admissible and relevant portions. These "edited tapes" were given to the Special Prosecutor. At the trial of Messrs. Mitchell et. al.—hereinafter referred to as "the Watergate trial"—most but not all of the edited tapes—between 16 and 22 hours worth—were played and the reels of tape were introduced into evidence as exhibits. During the playing of the tapes, those in attendance were furnished with earphones and with transcripts prepared by the Special Prosecutor's office. These transcripts were not introduced into evidence; however, the press and public were permitted to retain their copies, and the transcripts were widely reprinted.

On November 12, 1974, six weeks after the Watergate trial had begun, the broadcast-appellants filed a motion before Judge Sirica, the trial judge in the Watergate case, seeking permission to reproduce and broadcast the portions of the tapes introduced into evidence.[4] Copies

[3] United States v. Nixon, 418 U.S. 683 (1974).

[4] The Public Broadcasting System actually did not join the request until the following day. Warner Brothers, the phonograph record manufacturer who is a party to this case, filed its request several weeks later.

Two months before the networks filed their motion, a CBS correspondent had written a letter to Judge Sirica on behalf of two other television correspondents and himself, requesting, *inter alia*, that the tapes be made available to the news media during the trial. Judge Sirica asked then-Chief Judge Hart for his advice; after consulting with many of his colleagues Judge Hart informed Judge Sirica that it was their unanimous conclusion that release of transcripts "would appear to constitute more than adequate disclosure." Judge Sirica informed CBS by letter that he agreed with that conclusion.

of the motion were served on all parties to the trial and on former President Nixon. Judge Sirica decided that the movants lacked standing to make a motion in the criminal case, and therefore directed that the motion be turned into a miscellaneous civil action. He gave all persons desiring to respond one week to do so. Since Judge Sirica did not have time to study the request during the Watergate trial, the action was referred to another district judge, Judge Gesell.[5] Judge Gesell directed the Clerk of the Court to prepare a report on the feasibility of reproducing the tapes.

On November 26, 1974, the Clerk filed an affidavit indicating that reproduction seemed practicable. He reported that two copies of the "edited tapes" already had been made, so that while one was being played in the courtroom the other could be used to produce additional copies. He further reported that the machinery for making copies was available to the Office of Special Prosecutor; that their professional engineer was willing to assist in the reproduction for his standard fee; and that a deputy clerk could be made available to assure that only those portions of the tapes that were actually played into evidence would be reproduced. He estimated that to make one complete copy would take five to seven days and roughly 50 reels of tape, at a cost of $4 or $5 per reel.

On the same day that the Clerk's affidavit was filed, the Government and Mr. Nixon filed memoranda respond-

[5] Before ruling on the standing issue, Judge Sirica had referred the networks' application to Chief Judge Hart, who in turn asked Judge Gesell to study the matter and report at an Executive Session of the Court. After Judge Sirica decided to convert the application into a civil case, Judge Hart specially assigned the case to Judge Gesell.

ing to the broadcasters' motion. The Government stated that it did "not foresee that the rights of the defendants or of the United States to a fair trial would be jeopardized if the motion is granted," and therefore did not oppose the motion. Mr. Nixon did offer opposition, contending that to grant the motion would:

> have the effect of further intruding on the policies underlying the privilege of confidentiality for presidential communications, of further invading Mr. Nixon's privacy, of further embarrassing him and others whose voices appear on the tapes . . . and of further invading the privacy and causing embarrassment to persons or groups not participating in the conversations but who are mentioned therein . . .

On December 5, 1974, Judge Gesell entered an opinion upholding appellants' right to inspect and copy the tapes.[6] He found that the court's routine practice was to provide copies of exhibits when requested, and that this practice "reaches far back into our common law and tradition."[7] He concluded that Mr. Nixon's interest in avoiding embarrassment did not justifying deviating from the practice.[8] Because of anticipated "administrative and mechanical difficulties," however, Judge Gesell decided that no attempt should be made to copy the tapes before the Watergate trial, which was then in its final stages, had ended.[9] At the same time, he requested the parties to submit concrete proposals that would enable the tapes to be released after trial on a non-profit basis, "without

[6] United States v. Mitchell, 386 F.Supp. 639 (1975).

[7] *Id.* at 641.

[8] *Id.* at 642.

[9] *Id.* at 643.

special favoritism or priority" to all persons desiring copies.[10]

In response to Judge Gesell's request, the appellants jointly filed a two-part proposal. The first part concerned preparation of a master tape: appellants proposed that the engineer who had made the copies of the "edited tapes" be retained to make a master copy, and they made suggestions as to the equipment to be used, the size of the reels, the playing speed, and various other details. The appellants agreed to assume all costs incurred in preparing the master. The second part of appellants' proposal concerned distribution: they offered to suggest the names of firms that could duplicate copies at a rapid rate (15 per day) and reasonable price ($2.20-$4.00 per reel), and suggested a two-stage distribution: first, a simultaneous delivery to all persons who made requests within 5-10 days of an initial public notice; and second, either a first come first serve delivery or a delivery at fixed intervals to all those making subsequent requests. Appellants proposed that a deputy clerk be appointed to administer the entire plan.

On January 8, 1975, Judge Gesell rejected this plan.[11] He criticized it for failing (a) to provide for distribution without profit; (b) to attempt to minimize "commercialization" and "undignified use[s]"; and (c) to identify a person or agency to administer the plan. He stated that the Court was ill-equipped to assume the administrative responsibility, and that the burden was on

[10] *Id.* After issuing his opinion, Judge Gesell denied a motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970), reasoning that, "[t]he final order must be settled before some of the underlying questions of law . . . can be properly resolved. Certification of an abstract legal issue at this stage would delay the ultimate determination of the issues."

[11] *Id.* (Order of January 8, 1975).

the appellants to develop an adequate proposal. Because the Watergate trial had ended, Judge Gesell transferred the case back to Judge Sirica.

On March 6, 1975, Judge Sirica held a status hearing at which he requested the parties to submit briefs on whether the Watergate trial had "ended" for purposes of Judge Gesell's earlier decision denying release of the tapes until the trial was over. On April 4, 1975, Judge Sirica issued an opinion on "the narrow issue of the timing of the release." [12] He found that distribution of the tapes, and the mass marketing that would result, could prejudice the rights of the Watergate defendants should their convictions be reversed and a new trial be required.[13] Reasoning that this possible prejudice outweighed any interest in immediately releasing the tapes, the court denied "without prejudice" the appellants' applications.[14] Appellants brought this appeal.

II

A

The common law has long recognized a right to inspect and copy public records. In England, the right was narrowly circumscribed, and only a limited number of persons enjoyed it.[15] But the American courts tended to view any limitation as "repugant to the spirit of our democratic citizens," [16] and therefore granted all tax-

[12] United States v. Mitchell, 397 F.Supp. 186, 187 (D.D.C. 1975).

[13] *Id.* at 188.

[14] *Id.* at 188-189.

[15] H. CROSS, THE PEOPLE'S RIGHT TO KNOW 25 (1953); 66 Am.Jur.2d *Records and Recording Laws* § 15 (1973).

[16] Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749, 750 (1928).

payers and citizens access to public records.[17] It was the courts' view that "no sound reason could be advanced for depriving a citizen of his right; for it is evident that the exercise thereof . . . will serve as a check upon dishonest public officials, and will in many respects conduct to the betterment of the public service." [18]

That the common law right to inspect public records extends to judicial records is clear. As Judge Gesell observed, the right to inspect and copy judicial records in this jurisdiction has been settled at least since 1894, when, in *Ex Parte Drawbaugh*, 2 App.D.C. 404 (1894), this court rejected an appellant's attempt to seal the records in his appeal.[19] What we said then remains equally true today: "Any attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access. . . " *Id.* at 407. Indeed, the importance of "public exposure to trial court proceedings," and the existence of a right to inspect judicial records was recently reaffirmed by the District of Columbia Court of Appeals.[20]

[17] *See, e.g.*, State *ex rel* Colescott v. King, 154 Ind. 621, 57 N.E. 535 (1900); Nowack v. Fuller, *supra* note 16; Fagan v. State Board of Assessors, 80 N.J.L. 516, 77 A. 1023 (1910); State *ex rel.* Wellford v. Williams, 110 Tenn. 549, 75 S.W. 948 (1903); Clement v. Graham, 78 Vt. 290, 63 A. 146 (1906); Payne v. Staunton, 55 W.Va. 202, 46 S.E. 927 (1904). See also H. CROSS, *supra* note 15, at 56; Project, *Government Information and the Rights of Citizens*, 75 MICH. L. REV. 971, 1179 (1975); Note, *The Public Right of Access to Government Information Under the First Amendment*, 51 CHI. KENT. L.REV. 164, 169 (1974).

[18] State *ex rel.* Colescott v. King, *supra* note 17, at 538.

[19] *Cf. also* District of Columbia v. Bakersmith, 18 App.D.C. 574 (1901).

[20] United States v. Burka, 289 A.2d 376 (D.C.Ct.App. 1972).

And in other jurisdictions the right of access to judicial records is equally well-settled.[21]

This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. As James Madison warned, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." [22] Like the First Amendment, then, the right of inspection serves to produce "an

---

[21] *See, e.g.*, Ex Parte Uppercu, 239 U.S. 435 (1915) (available to litigant); *In re* Mosher, 45 C.C.P.A. 701, 248 F.2d 956 (1957); Garfield v. Palmieri, 193 F.Supp. 137, 143 (S.D. N.Y. 1961) (dictum), *aff'd*, 297 F.2d 526 (2d Cir.), *cert. denied*, 369 U.S. 871 (1962); Sloan Filter Co. v. El Paso Reduction Co., 117 F. 504 (C.C. Colo. 1902); Jackson v. Mobley, 157 Ala. 408, 47 So. 590 (1908); Daly v. Dimock, 55 Conn. 579, 12 A. 405 (1887); State *ex rel.* Hurd v. Davis, 226 Ind. 526, 82 N.E.2d 82 (1948); New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957); State *ex rel.* Williston Herald Inc. v. O'Connell, 151 N.W.2d 758 (N.D. 1967); Charlottesville Newspaper Inc. v. Berry, 215 Va. 116, 206 S.E.2d 267 (1974). *See also* H. CROSS, *supra* note 15, at 135-52; 20 Am. Jur.2d *Courts* § 61 (1965); 76 C.J.S. *Records* § 36 (1952); Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260 (1948).

That the tapes are not writings does not take them outside the common law right to inspect. *See, e.g.*, Merge v. City of Manchester, 113 N.H. 533, 311 A.2d 116 (1973) (right to copy magnetic computer tape); Oritz v. Jaramillo, 82 N.M. 445, 483 P.2d 500 (1971) (same); *cf.* 28 U.S.C. § 753(b) (1970) (right to inspect court stenographer's notes or mechanical recordings as well as the transcript).

[22] Letter from James Madison to W. T. Barry, August 4, 1822, in 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910).

informed and enlightened public opinion." [23] Like the public trial guarantee of the Sixth Amendment, the right serves to "safeguard against any attempt to employ our courts as instruments of persecution," to promote the search for truth, and to assure "confidence in . . . judicial remedies." [24] And in the instant case, like the Fifth and Fourteenth Amendments, the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to Judge Sirica's cramped courtroom the same opportunity to hear the White House tapes.

We find no need, and therefore have no occasion,[25] to decide the novel constitutional question of whether a ban on inspecting or copying the tapes would offend the First, Sixth, or Fifth Amendments to the Constitution. We refer to these constitutional provisions simply to underscore the importance of the values that the common law right seeks to protect, and to make clear our duty to tread carefully in this important area.

---

[23] Grosjean v. American Press Co., 297 U.S. 233, 247 (1936). Indeed, the Supreme Court has indicated that acquiring information qualifies for some First Amendment protection, *see* Branszburg v. Hayes, 408 U.S. 665, 681 (1972), as does receiving information, *see, e.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 44 U.S.L.W. 4686, 4688 (U.S., May 24, 1976). Disseminating information about court proceedings is, of course, constitutionally protected as well. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Bridges v. California, 314 U.S. 252 (1941).

[24] In re Oliver, 333 U.S. 257, 270 & n.24 (1948). *See also* 6 J. WIGMORE, EVIDENCE § 1834 (3d ed. 1940).

[25] *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

B

Appellee does not deny that a common law right to inspect and copy public records exists. Nor does he question its applicability to judicial records. He argues, however, that exhibits are *not* judicial records but are private property temporarily in the custody of the Clerk until the case in which the exhibits are introduced is concluded. He therefore contends that the common law right does not extend to inspections of exhibits.

The short answer to appellee's argument is contained in Rule 10(a) of the Federal Rules of Appellate Procedure, which provides that: "The original papers *and exhibits* filed in the district court . . . shall constitute the record on appeal" (emphasis added).[26] This rule is buttressed by the *Manual for the Clerks of the United States District Courts*, prepared by the Judicial Conference of the United States pursuant to statutory authority,[27] which classifies exhibits as "auxiliary case records," and, as Judge Gesell noted, requires that documentary exhibits be retained in the case file in cases of historical significance, a category into which the Watergate case readily falls.[28]

---

[26] *See also* F.R.A.P. 11(a) (the record "including the transcript *and exhibits* necessary for the determination of the appeal shall be transmitted to the court of appeals"); *id.* 11(b) ("documents of unusual bulk and *physical exhibits* other than documents shall not be transmitted . . .").

[27] 28 U.S.C. § 457 (1970).

[28] ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, MANUAL FOR CLERKS OF UNITED STATES DISTRICT COURTS § 201.1, 201.2(F)(1) (1966), ch. 13, Ex. 2, at 4-5, 16 (1954). *See also* Allen v. Lackey, 199 Okla. 513, 188 P.2d 215, 217 (1947) (exhibits "are a part of the court's records and as such are in the custody of and subject to the control of the court"). *But see* King v. King, 25 Wyo. 275, 168 P. 730 (1917).

Appellee's reliance on United States v. Monjar, 154 F.2d 954 (3d Cir. 1946), is misplaced. Although the court there

The Rules and the *Manual* could, perhaps, be overlooked if either logic or experience so required. Neither do. Denying public access to real and documentary evidence would be inconsistent both with the common law's attempt to provide the public with complete information and with what Judge Gesell found to be the district court's practice of providing copies of documentary and photographic exhibits on request.[29] To be sure, once a case is concluded, exhibits generally are returned to their owners,[30] primarily because it is impractical to retain the exhibits in the courthouse.[31] But appellee has not offered a single reason for denying public access to exhibits while they are in the Clerk's custody. Nor has appellee justified classifying documentary exhibits in historically significant cases as judicial records but denying that classification to non-documentary exhibits in such cases or to all exhibits in cases not of historical impact.

Appellee does point to examples of exhibits, such as pornographic movies and tapes of wiretapped conversations, that arguably should not be subject to public inspection. But while these hypotheticals may justify a

---

did say that the possession by the Clerk of exhibits was "at least in one sense, that of mere custodian," *id.* at 957, the court immediately indicated that it "did not intend to imply that the absolute control of exhibits introduced into evidence in a trial in a district court of the United States does not rest in that court," *id.* at 958. Indeed, the ultimate result in *Monjar* was that the Clerk was to retain the exhibits for a reasonable time so that Pennsylvania could litigate in Delaware courts the question of whether a Pennsylvania subpoena could reach documentary evidence located in Delaware.

[29] 386 F.Supp. at 641.

[30] Rules of the United States District Court for the District of Columbia, Rule 2-10(b).

[31] *Clerks Manual, supra* note 28, at § 207.1.

power to deny public access in special cases,[32] they do not justify a total ban on inspection. We therefore hold that the common law right to inspect and copy judicial records extends to exhibits.[33]

III

The right of access to judicial records has never been considered absolute. To the contrary, courts always have asserted the power to seal their records when deemed necessary.[34] Because no clear rules can be articulated as to when judicial records should be closed to the public, the decision to do so necessarily rests within the sound discretion of the courts, subject to appellate review for abuse.[35]

---

[32] *See* text at note 34 *infra*.

[33] The result we reach is in accord with the only case we have found in which inspection of exhibits was sought. Sloan Filter Co. v. El Paso Reduction Co., 117 F. 504 (C.C.Colo. 1902).

[34] *See, e.g.*, C. v. C., 320 A.2d 717 (Del. 1974); Sanford v. Boston Herald Traveler Corp., 318 Mass. 156, 61 N.E.2d 5 (1945); *In re* Caswell, 18 R.I. 835, 29 A. 259 (1893); H. CROSS, *supra* note 15, at 149-51; 76 C.J.S. *Records* § 36, at 140 (1952).

[35] *See* cases cited note 34 *supra*. Appellee argues that given the procedural posture of the case, our review of the district court's discretionary decision should be even more limited than usual. The major premise for this argument is that the district court did nothing more than stay action on appellant's request for the tapes pending the decision in United States v. Haldeman et al., *supra* note 2. Since stays are reviewable only by mandamus, Dellinger v. Mitchell, 442 F.2d 782 (D.C.Cir. 1971), appellee urges upon us the limited review appropriate in mandamus cases: determining whether "the trial judge misconceived the nature of his discretion or otherwise considered an irrelevant factor or refused to consider a relevant factor," Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524

To say that discretion exists, however, is not to say, as appellee contends, that what is involved here "is simply a policy determination." [36] Appellants seek to vindicate a precious common law right, one that predates the Constitution itself.[37] While the courts have sanctioned incursions on this right, they have done so only when they have concluded that "justice so requires." [38] To demand any less would demean the common law right.

(D.C.Cir. 1975). For three reasons, however, we reject appellee's premise.

First, in form the district court did not stay action; it "Ordered that the applicants' petition . . . [is] denied without prejudice." 397 F.Supp. at 189. Second, the substance of the district court's decision was *not* that adjudication of appellants' claim should be deferred, but that relief should be deferred. The district court's label, a "dismissal without prejudice," thus was appropriate, as was appellants' appeal under 28 U.S.C. § 1291. *See, e.g.*, United States v. Wallace & Tiernan Co., 336 U.S. 793, 795 n.1 (1949); 9 J. MOORE, FEDERAL PRACTICE ¶ 110.13[1] (1975). Finally, after the appeals in the Watergate case are adjudicated, appellants will no longer be able to press their contention that the district court's concern over prejudicing a possible retrial, *see infra*, does not justify withholding the tapes. Thus, under the "practical" approach to "final orders" delineated in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), the district court's decision is appealable as of right.

The appealability issue is not dispositive in any event, since as explained *infra*, it is our view that the district court did misconceive the nature of its discretion.

[36] Brief at 43.

[37] That at least some appellants assert this precious right in order that they might personally profit in no way diminishes their status as rightholders. Cf., *e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

[38] *See* sources cited note 34 *supra*; *cf.*, *e.g.*, MacEwan v. Holm, 226 Ore. 27, 359 P.2d 413 (1961) (placing burden on opponent of disclosure with respect to non-judicial records);

A serious question exists as to whether sealing transcripts of proceedings held in open court or exhibits displayed in open court is ever justifiable. We have found no cases in which an attempt has been made to do so. Rather, the general rule is that "[a] trial is a public event," and "[w]hat transpires in the courtroom is public property." [39] It is not necessary for us to decide, however, whether the right to inspect evidence introduced in open court is absolute. It suffices to note that once an exhibit

---

State *ex rel.* Youmans v. Owens, 28 Wis.2d 672, 137 N.W.2d 470 (1965), *modified on other grounds*, 28 Wis.2d 685a, 139 N.W.2d 241 (1966); Note, *supra* note 17, at 172.

[39] Craig v. Harney, 331 U.S. 367, 374 (1947). The interests served by the common law right of access to judicial proceedings are closely related to First Amendment interests. *Cf.* Nebraska Press Assn. v. Stuart, 44 U.S.L.W. 5149 (U.S., June 30, 1976). In the *Nebraska Press* case, the Court held that the First Amendment prohibited a judicial "gag order," which barred publication of information which might prejudice the defendant's right to a fair trial. The Court reserved judgment as to whether proceedings could be closed to prevent prejudicial publicity. *Id.* at 5157. Once an open hearing has been held, however, there is an especially heavy presumption against restraints on reporting, which was not overcome. *Id.* at 5155, 5158.

See also In re Washington Post Company, No. 76-1695 (4th Cir., July 21, 1976), and Miami Herald Pub. Co. v. Collazo, No. 75-649 (Fla. Dist. Ct.App., March 9, 1976). In *Washington Post*, the trial judge in a much-publicized criminal case involving a high government official had ordered that all filings in the case be sealed from inspection by the press or public; the Fourth Circuit concluded that the order constituted "an unnecessary prior restraint on freedom of the press . . .," and ordered it vacated. In *Miami Herald*, the trial judge ordered the terms of a settlement in a tort suit against the city of Miami sealed from inspection. The appellate court reversed this order, noting that the "right of the press and public to know should weigh heavily against a possible tendency to influence pending cases, particularly in borderline situations . . . ." *Id.* at 9.

is publicly displayed, the interests in subsequently denying access to it necessarily will be diminished. And here we conclude that the district court abused its discretion in allowing those diminished interests in confidentiality to interfere with the public's right to inspect and copy the tapes.

A

The court justified its decision primarily in terms of the potential for prejudice to the rights of the Watergate defendants should their convictions be reversed and a new trial be sought by the Government. It stated that it was unwilling to "take any action which carries the risk of causing possible prejudice" absent a compelling reason to do so, and it found no such reason to be present.[40]

In requiring appellants to demonstrate a "compelling reason" for exercising their rights, however, the court misconceived the nature of its discretion. The question the court should have addressed was whether appellee, who sought to interfere with a fundamental common law right, had sustained his burden of demonstrating that justice required denying access to the court records.

Once the question is recast in these terms, the answer becomes inescapable: the "*risk* of causing *possible* prejudice" at a *hypothetical* second trial does not justify infringing appellant's right to inspect and copy the tapes. This is true here for at least three reasons.

First, the very fact that a second trial is only a possibility makes the interest in preventing prejudicial publicity less than compelling.[41] If the chance of a retrial

---

[40] 397 F.Supp. at 188-89.

[41] This court has recently completed its consideration of the appeals of the Watergate defendants, reversing the conviction of defendant Mardian, United States v. Mardian, No. 75-1383 (D.C.Cir., Oct. 12, 1976), and affirming the convictions of all other defendants, United States v. Haldeman, No.

justifies interfering with the common law right of access here, then the public can be denied permission to inspect indictments, motions, transcripts, exhibits, or opinions in every case of public importance, at least until all appeals are exhausted. Moreover, even if the appeals were to end unsuccessfully there would still be a lingering possibility that a successful collateral attack would lead to a new trial. Thus, the logical conclusion of the district court's opinion may well be that which Mr. Nixon draws: "there may *never* come a time when . . . 'by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.' " [42]

Second, assuming *arguendo* that the risk of prejudicing a hypothetical second trial can ever justify restricting access to judicial records, the risk here is not sufficiently grave. Appellants are not seeking access to an inadmissible confession, a list of prior convictions, or other prejudicial evidence that, although part of the court's records, was kept from the jury.[43] Rather, appellants

---

75-1381 (D.C.Cir., Oct. 12, 1976). With respect to those defendants whose convictions were affirmed, the possibility of a second trial—and hence of any prejudice from release of the tapes—has obviously been significantly reduced. Although defendant Mardian is now entitled to a new trial, this does not, for reasons discussed *infra*, alter our conclusion that interference with appellants' right to inspect and copy the tapes is not justified on the facts of this case.

[42] Brief of Appellee at 42, *quoting* Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952).

A portion of the news value of such materials may be irrevocably lost by even a temporary delay. *See* Nebraska Press Assn. v. Stuart, *supra* note 39, at 5156.

[43] Pretrial publication of information admitted at trial generally has been regarded as posing less of a threat to the impartiality of juries. *Compare, e.g.*, Stroble v. California, 343 U.S. 181, 195 (1952), *and* United States v. Persico, 425 F.2d

seek tape recordings from which inadmissible statements have been carefully eliminated. These tapes were played to the jury, and presumably will be replayed at any retrial.[44] The transcripts of these conversations have received wide circulation and have been reenacted in various forums.[45] We seriously question whether listening to the tapes prior to a retrial would render every listener incapable of "lay[ing] aside his impression or opinion and render[ing] a verdict based on the evidence presented in court." [46]

Finally, it is of no small significance that at the time the district court issued its opinion, neither the Govern-

---

1375, 1380 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970), *with e.g.*, Marshall v. United States, 360 U.S. 310 (1959), *and* United States *ex rel.* Bloeth v. Deeno, 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963).

[44] We take judicial notice that while the appellants in United States v. Haldeman, *supra* note 2, contend that a proper foundation for the tapes was not established at their trial, Brief for Appellant Haldeman at 93-111, and while the admissibility of certain passages is contested, Brief for Appellant Mitchell at 122-51; Brief for Appellant Mardian at 62-84, they are not generally challenging the admissibility of the tapes.

[45] Indeed, in one respect release of the tapes might diminish the possibility for prejudicial publicity by making unnecessary further reenactments of the conversations, which inevitably involve verbal interpretations of the speakers' meaning. *Cf.* Nebraska Press Assn. v. Stuart, *supra* note 39, at 5158 (rumors may be more damaging than reasonably accurate news reports).

[46] Irvin v. Doud, 366 U.S. 717, 722-23 (1961). Indeed, it seems likely that, without undue effort, it would be possible to empanel a jury whose members had never even heard the tapes. Despite the widespread publicity the "Watergate affair" had received prior to the Watergate trial, 10 of the 12 jurors selected in that case claimed to have followed Watergate casually, if at all. *See* Brief of Appellee at 50 n.76, United States v. Haldeman, *supra* note 2 (citing transcript).

ment nor any of the Watergate defendants had objected to releasing the tapes.[47] The defendants' silence suggests that they did not believe their rights would be jeopardized, and their inaction surely would weigh against them were they later to challenge the impartiality of veniremen or jurors based upon exposure to the tapes.[48] Similarly, the Government's decision not to object suggests that it believed release would not make it impossible to empanel an impartial jury.

B

Appellants and appellee have briefed the question of whether the district court's decision is justified by a concern for the privacy of the persons whose conversations were taped or by the deference owed to presidential rec-

[47] Subsequently, defendant Haldeman has filed a one sentence statement expressing his belief that the tapes "should not be made public for the reason that such publicity would seriously jeopardize [his] rights to a fair trial in the event his pending appeal . . . results in a grant to him of a new trial." This pro forma statement hardly warrants careful attention. The Government has filed a two page memorandum which states that "[i]t is the belief of the United States that . . . there is little likelihood that republication of copies of the recordings in the future would preclude affording defendants a fair retrial. . . ." The Government adds, however, that it "is unable to conclude with certainty that large scale commercial reproduction and sale of the tapes would have no impact on the venire at a retrial." This qualification does not disturb our basic conclusion, that the Government does not anticipate that release of the tapes would preclude (or even seriously impede) the empaneling of an impartial jury in the event of a retrial.

It is instructive to observe that not even Mr. Nixon initially claimed that release of the tapes would prejudice a possible retrial; that issue was raised by the district court *sua sponte*.

[48] *See, e.g.*, Darcy v. Handy, 351 U.S. 454, 463 (1956); Stroble v. California, 343 U.S. 181, 193-94 (1952).

ords. That question, however, is not raised by this record. Although Judge Sirica referred to these considerations,[49] he did not base his decision upon them, presumably because Judge Gesell earlier had ruled that they did *not* justify denying access to the tapes.[50] The "narrow issue" before Judge Sirica was "the timing of the release."[51] The privacy and presidential deference considerations appellee relies upon essentially are not relevant to that issue. Thus, the only remaining question is whether Judge Gesell abused his discretion in deciding to permit appellants to exercise their right to inspect and copy the tapes.[52] We answer that question in the negative.

[49] 397 F.Supp. at 188. Judge Sirica's reference to the possibility of "mass merchandising techniques designed to generate excitement in an air of ridicule" plainly comes in the context of his discussion of the rights of the Watergate defendants. *Id.* His discussion of the deference owed Presidential tapes admittedly is more difficult to explain.

[50] 386 F.Supp. at 642. Judge Gesell's decision was the law of the case, and thus was presumptively controlling, *See, e.g.*, Greater Boston Television Corp. v. FCC, 463 F.2d 268, 279 & n.20 (D.C.Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); 1B J. MOORE, *supra* note 35, at ¶ 0.404 (1965).

[51] 397 F.Supp. at 187.

[52] Even this question technically is not before us, since Mr. Nixon has not filed a cross-appeal. But because the relevance of privacy and Presidential deference considerations have been briefed, we feel justified, in the interest of expedition, in discussing the issue.

To some extent, the evils appellee fears may be minimized by the final plan for release of the tapes approved by the district court. The court's power to control the uses to which the tapes are put *once released*, however, is sharply limited by the First Amendment. *See* Nebraska Press Association v. Stuart, *supra* note 39, at 5155, 5158; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

1. Privacy Considerations.—Perhaps the most important point to be made about Mr. Nixon's privacy claim is that he is not seeking to protect an expectation of privacy. The tapes already have been played in a public forum. Rather, appellee seeks to avoid only what he terms "intrusion on the sensibilities of those whose voices appear on the tapes." [53] But as appellee concedes, this is not the type of injury against which the law provides protection.[54] The fact that neither the legislatures nor the courts have felt this interest worthy of protection suggests that it is not a substantial basis for infringing the common law right to inspect judicial records.

But even if preventing embarrassment may sometimes justify access restrictions, there is plainly no justification for such restrictions here. The tapes at issue are *not* recordings of bedroom or other intimate conversations, and the embarrassment Mr. Nixon fears is *not* republication of highly personal matters. Rather, we deal with conversations between business associates admitted into evidence as proof of criminal misconduct. The embarrassment Mr. Nixon anticipates is largely that which results whenever misconduct or questionable conduct is exposed. If preventing this "injury" justifies interfering with the public's right to inspect records, then the common law right can always be defeated in criminal cases.[55]

---

[53] Brief at 47; *see id.* at 49.

[54] *Id.* at 49 n.22; *see, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 493-94 & sources cited (1975).

[55] As the Senate Committee on Government Operations stated, in disapproving proposed G.S.A. regulations, Public Access Regulations § 105-63.402-1(b) (March 19, 1975), reserving to the Administrator the right to restrict access to embarrassing portions of President Nixon's papers taken by G.S.A. pursuant to the Presidential Recordings and Material Preservation Act, Pub.L. 93-526, 88 Stat. 1695, 44 U.S.C.A. § 2107 note (Supp. 1976): "Almost by definition, the Watergate affairs are embarrassing, to those who were associated with them." S. Rep. No. 94-368 at 10, 94th Cong., 1st Sess. (1975).

Beyond this, there are a number of factors unique to this case that militate in favor of Judge Gesell's decision. First, the conversations at issue relate to the conduct of the Presidency, and thus they are both impressed with the "public trust," [56] and of prime national interest. Second, the fact that the transcripts of the conversations already have received wide circulation makes this unlike a hypothetical case in which evidence previously accessible only to a few spectators will suddenly become available to the entire public. Finally, it seems likely that as a result of the Presidential recordings and Material Preservation Act, the words and sounds at issue here will find a further entry way into the public domain.[57]

Significantly, under the regulations recently proposed, access to the Nixon papers can be restricted only if release "would constitute a clearly unwarranted invasion of personal privacy or constitute libel or slander of a living person." Public Access Regulations § 105-63.402-1(b) (April 13, 1976). The Senate rejected almost identical language, Public Access Regulations § 105-63.402-1(b) (Oct. 15, 1975), when submitted in the second draft, S. Res. 428, 122 Cong. Rec. S5290-91 (daily ed. April 8, 1976); whether the Senate will continue to insist on its even more open proposal, S. Rep. No. 94-368, *supra*, remains to be seen.

[56] Nixon v. Administrator of General Services Administration, 408 F.Supp. 321, 358 (D.D.C.), *appeal docketed*, 44 U.S.L.W. 3641 (U.S. May 11, 1976) (No. 75-1605); *see id.* at 358-59 & n. 53.

[57] *See* note 55 *supra*. As Judge Siricia noted, because of the litigation over the constitutionality of the Act and the time necessary for processing the tapes and papers, release will not be immediate. In addition, once the tapes are made public, there may still be a ban on copying them. That ban will not be for four years as it appeared when Judge Sirica wrote his

For all these reasons we are unable to conclude that Judge Gesell abused his discretion in rejecting the claim of privacy.

2. Deference to Presidential Conversations.—In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court spoke of the "high degree of deference" owed to Presidential conversations.[58] The context of the Supreme Court's statements, however, make clear that its primary concern was with safeguarding the *confidentiality* of such conversations, in order to provide "protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking."[59] Thus the Court stated,[60]

> [T]he District Court has a very heavy responsibility to see to it that Presidential conversations, *which are either not relevant or not admissible*, are accorded that high degree of respect . . . .

And again:[61]

> [T]he District Judge will at all times accord to Presidential records that high decree of deference . . . and *will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden*

---

opinion, *see* Regulations on Access § 105-63.404(c) (March 19, 1975); the Senate rejected that proposed regulation as inconsistent with the spirit of the Act, S. Res. 244, 121 Cong. Rec. S15808-08 (daily ed. September 11, 1975); *see* S. Rep. No. 94-368, at 12-13 94th Cong., 1st Sess. (1975). The newer regulations provide for a two-year ban, Public Access Regulations § 105-63.404(c) (April 13, 1976); whether the Senate will accept this shorter period is uncertain.

[58] 418 U.S. at 715.

[59] *Id.* at 708; *see id.* at 711-12.

[60] *Id.* at 714-15 (emphasis added).

[61] *Id.* at 715-16 (emphasis added).

> *applies with even greater force to excised material.*
> . . .

By definition, however, the tapes played at trial are no longer confidential. Thus appellee is left to argue that somehow it would be "unseemly" to allow tapes of White House conversations to be marketed and publicly distributed. But this is essentially a question of taste, and provides a singularly weak basis for a court to interfere with the exercise of a long-established common law right. Indeed, a substantial argument could be made that it is highly appropriate for recordings of conversations concerning the conduct of public business to be marketed to the public, or at least no more inappropriate than for transcripts of the conversations to be marketed. In any event, in light of the strong interests underlying the common law right to inspect judicial records—interests especially important here given the national concern over Watergate—we cannot say that Judge Gesell abused his discretion in refusing to permit considerations of deference to impede the public's exercise of their common law rights.

IV

On remand, the parties and the court will have to attempt to develop a plan for release of the tapes. The principles governing release are well set out in Judge Gesell's initial opinion, and are essentially undisputed. Distribution should be prompt, and on an equal basis to all persons desiring copies. The court cannot be expected to assume the cost of distribution, nor should the court's time or personnel be unduly imposed upon. And neither the court, nor any agent it appoints, should profit from the public's exercise of its common law right. Within these broad limits, the court has considerable discretion.

MACKINNON, *Circuit Judge*, dissenting: In my view, at this time, we should affirm Judge Sirica in his decision refusing to permit a reproduction of portions of the tape *exhibits* until the appeals in the relevant cases are decided and the criminal charges disposed of by a final judgment.[1] Access to exhibits in a criminal trial is somewhat different from access to the transcript of oral testimony. Physical exhibits, such as the tapes, are the personal property of the owner, and the usual practice is to return them when the case is finished.[2] The fact that property is used as evidence in a court trial does not divest the owner of his title to it. Also, there is an integrity about real exhibits that needs to be protected until the exhibit is no longer needed *in court*. Tapes are especially subject to the possibility of alteration and erasure, as we all know from the incidents involving these tapes, and should not be subjected to any unnecessary handling that might damage them or constitute good cause in a subsequent trial for a court to reject them as unreliable evidence. Until the criminal trials where these tapes may be used as evidence are completely final and further need for the exhibit is foreclosed, courts and the Government should be concerned that they do not become a party to manufacturing presumptive prejudice against defendants.[3] In view of the possibility of a retrial following the reversal by this court of the Mardian conviction, and the strong possibility of petitions for certiorari that would cause the other convictions to lack finality until the Supreme Court finally rules, it is my opinion that Judge Sirica made a wise decision in refusing the requested reproduction of portions of these exhibits.[4] A significant *reduction* in the possibility of prejudice to a fair trial should not cause a court concerned with constitutional rights to ignore the possibility of prejudice that remains.[5]

I respectfully dissent.

---

[1] Thereafter, I would not worry about possible collateral attacks.

[2] *Cf.* United States v. Wilson, —— U.S.App.D.C. ——, —— F.2d —— (No. 75-1713, June 28, 1976).

[3] Murphy v. Florida, 421 U.S. 794 (1975); Marshall v. United States, 360 U.S. 310 (1959).

[4] This case involves a situation where the trial judge acted to assure the integrity of a vital trial exhibit until it was no longer needed for trial purposes. On that basis it is distinguishable from the two cases cited in n.39 in the court's opinion which did not involve exhibits that might be altered or destroyed by handling, *i.e.*: In re Washington Post Company, No. 76-1695 (4th Cir., July 21, 1976) and Miami Herald Pub. Co. v. Collazo, No. 75-649 (Fla. Dist. Ct. App., March 9, 1976). It is doubtful that any person would consider the cases here to involve "borderline situations."

[5] *Cf.* Majority opinion, n.41. Now that the conviction of Mardian has been reversed, the majority opinion reflects a lack of concern for the prejudice it may cause to such defendant when it states that "the very fact that a second trial is *only* a possibility makes the interest in preventing prejudicial publicity *less than compelling*." Majority opinion, p. 17 (emphasis added).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1409 September Term, 1976
Misc. 74-128

United States of America
v.
John Mitchell, et al.
In Re: National Broadcasting Company, Inc., et al.,
Appellants

No. 75-1410 Misc. 74-128

United States of America
v.
John Mitchell, et al.
Warner Communications, Inc.,
Appellant

Before: Bazelon, Chief Judge; MacKinnon, Circuit Judge and Merhige*, United States District Judge for the Eastern District of Virginia

[December 3, 1976]

ORDER

On consideration of the petition of respondent Richard Nixon for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

*Sitting by designation pursuant to Title 28 U.S.C. §292(d).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	]	
v.	]	Misc. No. 74-128
JOHN N. MITCHELL, ET AL.,	]	
IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; and WARNER COMMUNICATIONS, INC.	]	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court solely for consideration of the narrow issue of the timing of the release, if ever, of certain tapes received in evidence in the case of *United States v. Mitchell, et al.*, CR 74-110. Since this case was returned to the Court by Judge Gesell on January 8, 1975, the Court has given serious consideration to this issue.

As noted by Judge Gesell in his Memorandum and Order of December 5, 1974, and as further indicated in his Order of January 8, 1975, there are several obstacles which must be overcome before the tapes might be released. Because of the difficulties which Judge Gesell anticipated, including such problems as administration, funds, technology and manpower, he ordered that no attempt to copy the tapes should be made "until after

the trial." (Memorandum and Order, December 5, 1974, at 7.)

This Court, as the trial court, is well aware of the many problems that must be resolved before any Presidential tapes might be reproduced and distributed to the public at large. At present the Court is seriously concerned about the problem of the timing of any release or reproduction of the tapes. On March 6, 1975, the Court presided at a hearing at which counsel for the applicants, as well as Mr. Nixon's attorney and a representative of the Watergate Special Prosecution Force addressed this single issue. At the Court's request briefs were submitted thereafter and the Court took the matter under advisement.

All four defendants convicted in the aforementioned criminal trial have filed notices of appeal in the U.S. Court of Appeals for the District of Columbia. Should one or more of the defendants prevail on appeal the case might have to be retried, which would mean that a new jury would have to be empanelled and the evidence resubmitted. Thus, the Court still must be careful to protect the rights of the defendants as well as the integrity of the evidence. Absent some compelling reason, the Court should not take any action which carries the risk of causing possible prejudice to the rights of the defendants should a retrial be necessary.

This much would be expected of any judge and, indeed, no less has been specifically required of this Court by the Supreme Court's opinion of July 24, 1974, in *United States v. Nixon*, ___ U.S. ___ ; 94 S.Ct. 3090 (1974). After a careful review of the very sensitive matter of requiring a President to produce, pursuant subpoena, information which he claimed was privileged, the Supreme Court held that the subpoenaed presidential

tapes had to be produced by President Nixon for *in camera* judicial inspection. Then the high Court turned to the matter of the enforcement of the subpoena by this Court. Again it stressed the sensitive nature of the presidential tapes, particularly the privileged or otherwise inadmissible or irrelevant portions, and noted: "We have no doubt that the District Judge will *at all times* accord to presidential records that high degree of deference suggested in *United States v. Burr* [, 25 Fed. Cas. 30 (No. 14,692d) (1807)]. . . ." *Id.* at 3111. (Italics added.) It is in the light of this solemn responsibility as well as a concern for the rights of the defendants that the applicants' request for immediate access to the tapes must be examined.

Mr. Nixon's attorneys point out that the release of the tapes for reproduction and distribution envisioned by the applicants and their friends would result in the manufacture of permanent phonograph records and tape recordings, perhaps with commentary by journalists or entertainers; marketing of the tapes would probably involve mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales. It is further implied that the tape copies would be put to untold varieties of inappropriate and scandalous uses, just as any other commercial recording would be. Thus, it appears to the Court that the rights of the appellants in the criminal case (and many others), might be seriously and permanently damaged as a result of granting the applicants' request for immediate release of the tapes.

The Court is not unmindful of the applicants' positions. However, the authorities and arguments cited by the plaintiffs focus more on the problems of continuing (post-trial) restraints on speech and publication like "gag orders" (and the Court lifted such a restriction in the *Mitchell* case the day the verdict was

rendered) than on the problems in delaying the possible release for production and distribution of presidential tapes received in evidence.

Furthermore, it bears noting that the transcripts of the desired tapes were made available to the public at the same time the tapes were played to the jury. In light of this fact, the argument that the public's "right to know" presents a compelling reason for granting immediate access to the tapes must be rejected.

Finally, the Court notes that under Section 104(a) of the Presidential Recordings and Material Preservation Act, Public Law 93-526, December 19, 1974, the Administrator of the General Services Administration was required to submit to the Congress a report proposing and explaining regulations that would provide public access to virtually all of the tape recordings made by and during the administration of former President Nixon. That report was given to the Congress on March 19, 1975.

Section E of the Report deals with the problems involved in the processing of White House tapes. There are approximately 5,000 hours of conversations recorded. The administrator notes that about one-third of the tapes were recorded during the nine months in which some abuse of governmental power may have been discussed and that the tapes for those months will be processed first. He estimates that it will take a year to completely process this first group of tapes (and that it will be six months before any part of them will be released). It will take two more years to finish processing the rest of the tapes. Thus, it will take an estimated three years just to process all the tapes. And it is further estimated that the processing will not even begin for a year and a half. Thus, the Administrator estimates that it will be two years

before even the first segments of those tapes will be made available for the public to hear.*

As for making copies of the tapes available to the public, the Administrator states:

> [I]n order to prevent unwarranted commercialization, the public will not be allowed to duplicate or buy copies of the tapes during the 3-year processing period. After that time, the Administrator will review the situation to determine whether it is appropriate to allow reproduction of the tapes. General Services Administration, *Report To Congress On Title I*, E-9 (March, 1975).

While it is questionable whether the Report and Regulations apply to the tapes played during the *Mitchell* trial and at issue here, (see generally *Id.* at E-8) nevertheless, the scheduling and timing of the release of the presidential tapes under the Regulations is a very helpful point of reference. Since it will be approximately two years before any presidential tapes will even be made available to the public to listen to under the G.S.A. plan; and since it will be four and one-half years before the Administrator will even consider whether it might be appropriate to make copies of the presidential tapes for public purchase, the Court can see no compelling reason why these tapes received in evidence should be immediately released for possible reproduction and distribution.

Upon careful consideration of these and other factors it is the conclusion of the Court that (1) until the appeals have been received, the trial of the criminal case is not over, at least for purposes of the release of the tapes received in evidence for copying and distribution; (2)

---

*See Attachment A.

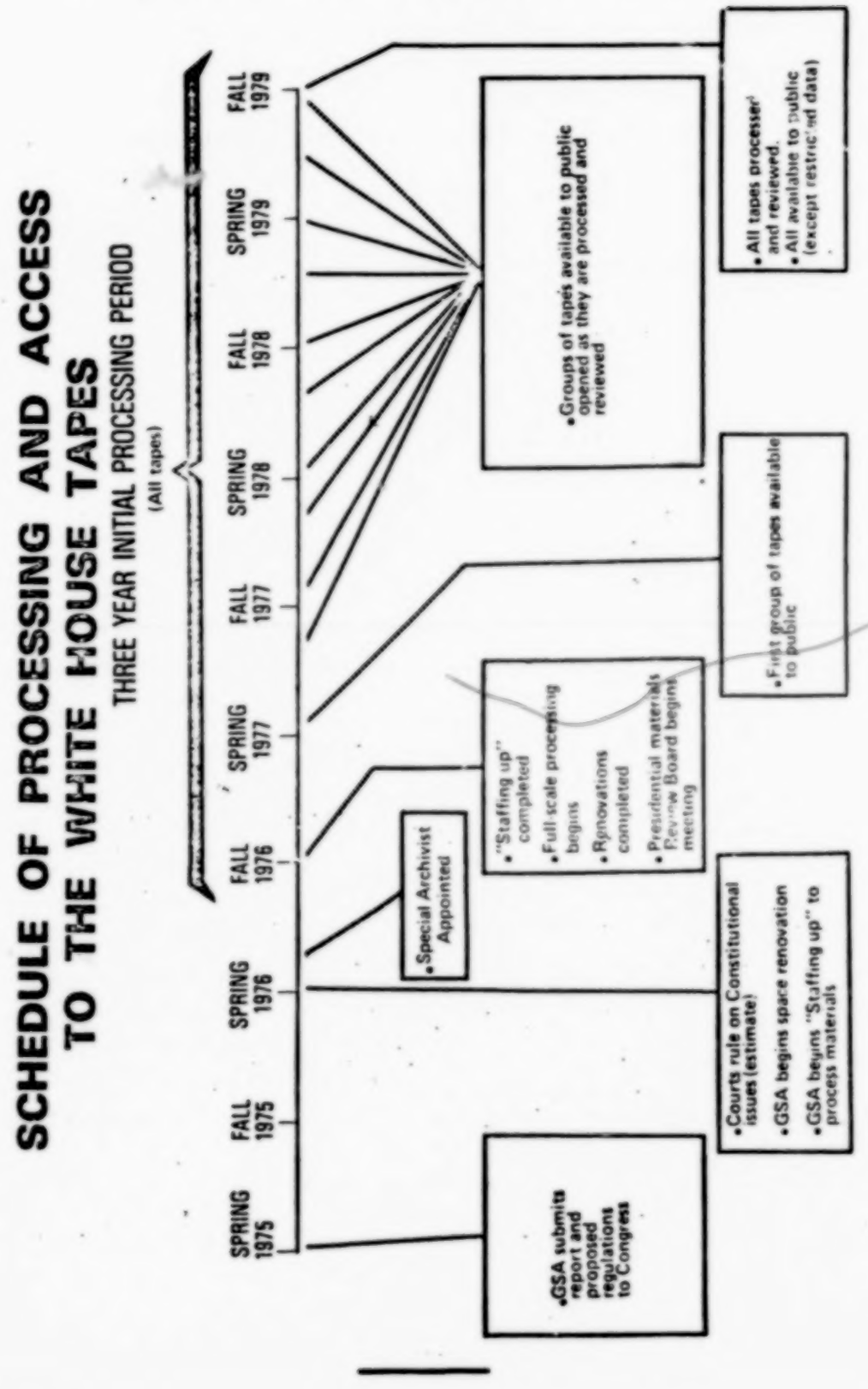
there is no compelling reason for the immediate release of the tapes for the above-stated purposes; and (3) no harm will be done if the possible release of the tapes and any further implementation of the December 5, 1974 Order is delayed until the appeals in the *Mitchell* case are decided.

Therefore, it is by the Court this 4th day of April, 1975,

ORDERED that the applicants' petitions for immediate access to the tapes for the purpose of making copies for public distribution be, and the same hereby are, denied without prejudice.

/s/John J. Sirica
United States District Judge

ATTACHMENT "A" (From G.S.A. Report of March 19,197


SCHEDULE OF PROCESSING AND ACCESS
TO THE WHITE HOUSE TAPES
THREE YEAR INITIAL PROCESSING PERIOD
(All tapes)
SPRING 1975
FALL 1975
SPRING 1976
FALL 1976
SPRING 1977
FALL 1977
SPRING 1978
FALL 1978
SPRING 1979
FALL 1979
•GSA submits report and proposed regulations to Congress
•Special Archivist Appointed
•Courts rule on Constitutional issues (estimate)
•GSA begins space renovation
•GSA begins "Staffing up" to process materials
•"Staffing up" completed
•Full scale processing begins
•Renovations completed
•Presidential materials Review Board begins meeting
•Groups of tapes available to public opened as they are processed and reviewed
•First group of tapes available to public
•All tapes processed and reviewed.
•All available to public (except restricted data)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Misc. No. 74-128
JOHN D. MITCHELL, ET AL.	)	
	)	
IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; and WARNER COMMUNICATIONS, INC.	)	

MEMORANDUM AND ORDER

Several television and radio broadcasters noted in the caption moved pursuant to Rule 47 of the Federal Rules of Criminal Procedure requesting copies of those portions of taped conversations initially recorded in former President Nixon's offices which were subpoenaed, received in evidence, and played to the jury in this widely publicized criminal case still on trial before Judge John J. Sirica. Copying would be accomplished at applicants' expense with the aid of the Clerk of Court from the evidentiary tapes. There would be no recording in the courtroom. Applicants propose to broadcast at least portions of the tapes locally and nationwide over both television and radio.

The reproduction of trial evidence received in tape form for subsequent public use raises an issue of first

impression in this District and the Clerk of Court, James F. Davey, properly seeks guidance from the Court. No published precedent directly in point has been cited or found in any other jurisdiction. The matter has been treated as a miscellaneous proceeding and separately assigned at Judge Sirica's request. All defendants and the Special Prosecutor have been served and the Court has before it various briefs and affidavits, including an affidavit from the Clerk of Court explaining some of the mechanical and administrative considerations presented. Former President Nixon, by his attorneys, opposes the motion. The Reporters' Committee for Freedom of the Press has been granted permission to file a brief amicus.*

Applicants claim a constitutional right to reproduction of the tapes under the First Amendment to the Constitution. This claim is wholly without merit. A public trial is taking place, all media, including applicants, have been present, and, by order of the trial judge, provided with earphones to enable their representatives to hear exactly what the jury heard when the tapes were actually played in the courtroom. There were no restraints placed on their subsequent reporting. Indeed, the contents of the tapes have been fully reported and written transcripts were made available to all media to assure reasonable accuracy.

The Supreme Court has repeatedly held in recent years, although admittedly by split votes, that members of the press are not constitutionally guaranteed a "right of access" greater than that afforded the general public. *Pell v. Procunier*, 94 S. Ct. 2800, 2810 (1974); *Saxbe v. Washington Post*, 94 S. Ct. 2811, 2815 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684-5 (1972); *Estes v. Texas*, 381

*In addition, the Mutual Broadcasting System, Inc. has made separate application in letter form.

U.S. 532, 540 (1965). *See also,* Address of Mr. Justice Stewart, "Or of the Press." Yale Law School Sesquicentennial Convocation, Nov. 2, 1974, at p. 9:

> So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can. But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information or to require openness from the bureaucracy.... The Constitution, in other words, establishes the contest, not its resolution.

The question presented by the applications then boils down to a far simpler issue. Are representatives of broadcast media entitled along with the general public to aural copies of exhibits after they have been received in evidence in a criminal trial as a normal concomitant of the constitutional requirements of a public trial found in the Sixth Amendment to the Constitution?

As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh,* 2 App. D.C. 404, 407 (1894). *See also, United States v. Burka,* 289 A.2d 376 (1972); *Belt v. Pr. George's County Abstract Co.,* 73 Md. 289, 20 A. 982 (1890).

The Court stated in *Drawbaugh,*

> ...any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and to its records, according to long-established usage and practice.

2 App. D.C. at 407-8. This proposition applies without a showing of a particular "legitimate interest" in the records requested. *In re Mosher,* 248 F.2d 956, 958 (C.C. P.A. 1957).*

In this particular instance this general right to have access and copy exhibits is especially reinforced by directives of the Judicial Conference of the United States issued under authority of 28 U.S.C. §457. The Clerks of Court for District Courts throughout the United States are specifically instructed to retain on file for public inspection for ten years documentation in cases of significant historical importance and then to deposit such materials with the Federal Records Center under the aegis of the General Services Administration for subsequent

---

*The supposed requirement of English common law that one have a personal "legitimate interest" in judicial records before access would be granted was in fact simply a requirement of standing to sue to enforce the right in mandamus where access had been wrongfully denied. See Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749, 60 A.L.R. 1351 (1928). No one in this instance has been denied access to copy the tapes in evidence.

In this jurisdiction the practice has been to make court documents available without a showing of "special interest." Were this an action in mandamus, rather than an application to instruct the Clerk as to Court policy, the media would have standing to compel equal protection of their right of access consistent with that routinely accorded other members of the public. McCoy v. Providence Journal Co., 190 F.2d 760 (1st Cir.), *cert. denied,* 342 U.S. 894 (1951).

years under the guidelines set by 44 U.S.C. §3301 and the implementing regulations appearing at 41 C.F.R. §§101-11.101 et seq. The *Manual for the Clerks of the United States District Courts,* Chapter 13, Exhibit 2, (Ref. 1301.4) at pp. 4-5, item 6(a) (1954), directs, among other things, that "case papers and documentary exhibits" filed in criminal cases involving the President or officials appointed by the President must not be disposed of even after ten years. Cases of this type are considered to contain "documentary evidence of movements of historical forces" and "biographical data" of obvious importance for persons interested in "social, economic and political research." *Ibid.,* note to item 6, p. 16.

Thus there is congressional, judicial and executive recognition of the need to make available and preserve materials from a trial like the present, including the evidentiary tapes, bearing as they do directly on executive conduct at the highest levels. It should be noted that Warner Communications, Inc. by its separate application specifically requests access in order to disseminate permanent phonograph and tape recordings of evidentiary tapes for use in homes, libraries and schools.

Neither the defendants in this case nor the Special Prosecutor object to release of the tapes, nor has Judge Sirica indicated any reason to deviate from general practice in this instance in the interests of a fair trial. Former President Nixon does object. He seeks to avoid embarrassment and wide publicity, asserting that he still has a property right in the tapes and accordingly a privilege against disclosure, except to the extent that that privilege has been invaded by the doctrine of *United States v. Nixon,* 94 S. Ct. 3090 (1974). Former President Nixon is before the jury as an alleged co-conspirator and his acts, as reflected in the tapes, are pertinent to the

theory of the case on which the Special Prosecutor is proceeding. The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial. Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality "consistent with the fair administration of justice." *United States v. Nixon, supra,* 94 S. Ct. at 3111. His words cannot be retrieved; they are public property and his opposition is accordingly rejected.

It should be understood that the Court is not called upon or in any way attempting to decide whether or not the dissemination of the tapes to the public is or is not desirable. On the one hand, much has been already printed; on the other, the aural atmosphere, emphasis and connotations of the taped discussions may be peculiarly illuminating. The law must be applied and the fact the evidence is in aural form is of no special consequence. The tape exhibits are in evidence and have therefore come into the public domain and the public should have the opportunity to hear them. Whether any individual affected has a right under the law of privacy or related doctrines against anyone who thereafter republishes is not to be determined here. *See, e.g., Melvin v. Reid,* 112 Cal. App. 285, 297 P. 91, 93 (1931); *Briscoe v. Reader's Digest Assn.,* 93 Cal. Rptr. 866, 483 P.2d 34 (1971); *Restatement (I) of Torts,* §867, Comment C (1939).

The courts are a branch of government and a criminal proceeding involving officials holding high positions of public trust must peculiarly remain open for the closest scrutiny and discussion by citizens. It was in just such situations that the Sixth Amendment was intended to have its greatest thrust. As the Supreme Court has succinctly stated, "what transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Only in this fashion can arbitrary judicial authority be prevented.

Before the tapes can be released, certain immediate obstacles must be overcome. Because the tapes contain material that was not played to the jury, they will have to be rerun to remove the excluded material. There is need, as the Special Prosecutor points out, to preserve the integrity of the tapes as received in evidence during the reproduction process. Considerable time, perhaps running as much as several weeks, will be required to reproduce them. Court personnel and experts now fully committed to the trial must be consulted. Because of these administrative and mechanical difficulties no attempt should be made to provide verbatim sound copies, in addition to the transcript copies already provided, until after the trial.

If and when released, there will be a broad demand for copies, as witnessed by the applications already filed, when availability becomes better known. The office of the Clerk of Court is not equipped with trained personnel or facilities allowing it to become involved in any mass release of numerous copies of the tapes, even at the expense of applicants. Furthermore, if any release is to be made, it must obviously be accomplished on a basis which does not permit overcommercialization of the evidence. Clearly, all persons, whether or not members of

the press, desiring copies must be accommodated without special favoritism or priority.

There is time between now and the end of the trial to determine whether a satisfactory mechanism and procedure can be evolved which will permit the Court to prepare only a single copy of the tapes as played and then place its subsequent reproduction and distribution in the responsible hands of an organization, agency or person which, without profit, can, for a defined limited period, assure fair and equitable distribution to all categories of applicants. Without in any way indicating whether it is practical or possible to release aural copies in addition to the transcripts already released, the Court solicits any suggestions which the Special Prosecutor, the defendants or applicants may have as to an appropriate method for facilitating a release which is consistent with the considerations enumerated generally above. Suggestions should be submitted in concrete detail and filed with the Clerk of Court on or before January 3, 1975.

In the meantime, the Clerk shall upon completion of the trial promptly proceed to reproduce a single set of the tapes in evidence which shall contain only those portions played to the jury during trial. He shall consult with expert personnel to assure accuracy of this reproduction and to avoid compromising the evidentiary value of the exhibit in any respect. He shall advise the Court when this task is completed and withhold the reproduced tapes from public inspection until further order of the Court. Final action on the applications will be taken at a later date in the light of developments. The opposition filed on behalf of former President Nixon is denied.

SO ORDERED.

December 5, 1974.

/s/Gerald S. Gesell
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Misc. No. 74-128
JOHN MITCHELL, ET AL.	)	
	)	
IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; and WARNER COMMUNICATIONS, INC.	)	

ORDER

The Court has considered the joint proposals of the original applicants submitted by their attorneys in an effort to meet the considerations outlined on page seven of the Court's Memorandum and Order of December 5, 1974. The proposals will not be accepted.

The burden is upon the applicants to come forward with a satisfactory plan to be administered without profit by some responsible agency or person other than the Clerk of Court. It is a prerequisite to any plan that commercialization of the tapes or any undignified use of the material be minimized. Applicants have failed even to consider these matters. Moreover they suggest no responsible agency or person to administer the plan and merely undertake to place all of these problems back on the Court, which is not equipped with necessary funds, technology or manpower.

All pending applications are at this stage denied without prejudice and the matter is transferred back to

Judge Sirica, with his approval, for any further action that may be appropriate in the premises at some later date.

/s/Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

January 8, 1975.

APPENDIX E

October 2, 1974

Mr. Fred Graham
CBS News
2020 M Street, N. W.
Washington, D. C.

Dear Fred:

This comes in response to your letter of September 17th on behalf of yourself, Carl Stern and David Schoumacher.

I have carefully considered each of the three requests you made. As regards the first, I intend to file an order in the near future clarifying the order of March 1st which prohibits extra-judicial statements by subpoenaed witnesses. The clarification will relieve a witness from that restriction once he or she has been excused.

Concerning the transcripts of recorded conversations, I understand that the government intends to offer transcripts not as evidence, but as aids to the jury in listening to any tapes that may be admitted into evidence. Whether transcripts will be used in this manner is still an open question. In the meantime, I cannot respond to your request for copies.

Finally, I have consulted with various other judges of this court concerning the release of tape recordings that are introduced as evidence. I have enclosed a copy of a memorandum to me from Chief Judge Hart which describes the consensus of opinion on this subject among the judges, a consensus with which I agree. I have

therefore decided not to release any tapes or copies of tapes.

Sincerely yours,
/s/John J. Sirica

Enclosure
cc: Carl Stern
David Schoumacher
Sid Davis

United States District Court
for the District of Columbia
Washington, D. C. 20001

September 18, 1974

MEMORANDUM:

TO: Judge Sirica

Reference is made to your memorandum to me of this date, concerning Mr. Graham's request made on behalf of CBS, NBC and ABC that copies of any tape recordings admitted into evidence be made available to news media representatives during the trial. The purpose of this is to permit the news media to actually broadcast the tapes in question.

I have consulted with many of the Judges of this Court concerning your memorandum and I beg to advise you that we unanimously agree as follows:

1. The ultimate decision as to whether these tapes be made available or not must be up to the Trial Judge.

2. The most troublesome aspect of this proposal in many ways is that there would be played on the electronic media a precise reproduction of what occurred

in Court when the tape was played. We have staunchly opposed, as you know, any broadcasting of Court proceedings. In a sense, if we allow replay of what occurred in Court, it will be very difficult to explain why we will not let a tape recorder be used by a court reporter to replay the entire proceedings.

3. As we understand it, actual verbatim transcripts will be exhibited and marked and available to the Press and that would appear to constitute more than adequate disclosure to the public of what the tapes contained.

/s/George H. Hart, Jr.
Chief Judge

APPENDIX F

Record Group 267
Job No. NN369-89

GENERAL SERVICES ADMINISTRATION

Accession Inventory

Source: Supreme Court of the United States

Location: Supreme Court Building
1 First Street, NE
Washington, DC 20543

The following Accession Inventory is hereby agreed to by the undersigned duly authorized representatives of the agency named above and of the Archivist of the United States, respectively; and the records are accepted for deposit with the National Archives of the United States.

Description of Records: Audiotape recordings of oral arguments before the Supreme Court during the 1972 term. Tapes are numbered from 883-900 and 1-26. Special items include tape 889A Justice Harlan Memorial Service and tape 899A Justice James Byrnes Memorial Service. Note also that tape 900 has three reels and tape 1, 2, and 3 are composed of four reels each.

Restrictions on the Use of Records: (a) The tapes may be played for Federal personnel in connection with official duties and to the general public for serious scholarly and legal research. (b) Typewritten transcriptions of the oral arguments may be furnished to these persons at a fee provided that, in each instance, three copies of these transcriptions are deposited in the Library of the Court. (c) Copies of the tapes may not be furnished to persons other than the Justices without the permission of the Marshal of the Court, and unless three years shall have

expired since the argument of a recorded case. (d) The National Archives may not identify the voices of members of the Court in connection with any use of the tapes, either when they are being played or in making or furnishing transcriptions. (e) Copies of the tapes will not be reproduced for commercial purposes.

Executed in duplicate at Washington, DC., this 9th day of April, 1974 A.D.

/s/F. M. Hepler
Representing the Supreme Court
of the United States

/s/James W. Moore
Representing the Archivist
of the United States